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AT THE HEART OF THE MATTER, NZ DRUG FOUNDATION.
Te Tūāpapa Tarukino o Aotearoa

New Zealand Drug Foundation submission on the Misuse of Drugs Amendment Bill

Submitted to the Health Select Committee on 11 April 2019

Tēnā koe

In 2018 we spent many months researching the effects of synthetic cannabinoids on individuals and communities. We talked to individuals and organisations about why people use these very dangerous substances and how we can help them to reduce or stop their use.

This Amendment Bill represents a small but (mostly) positive step towards addressing the synthetics crisis. It also serves to highlight the inadequacies of the Misuse of Drugs Act 1975 to address the harms caused by drugs in New Zealand. We see this Bill as a stepping stone to even greater things – the complete overhaul of our drugs system and its replacement, in the near future, with a new health-focused law.

Our submission is structured to address the three key aims of the Bill:

- **PART ONE** We support the classification of AMB-FUBINACA and 5F-ADB as Class A - but with major reservations
- **PART TWO** Increased Police 'discretion' is an important step forward. It must be followed by an overhaul of our current drug law
- **PART THREE** The new temporary drug class order gives too wide a power to the Minister, without sufficient checks and balances

Thank you for considering our submission. We also request the opportunity to make an oral submission.

Ngā mihi,

Ross Bell

Executive Director

The Drug Foundation is a charitable trust. We have been at the forefront of major alcohol and other drug debates for 30 years, promoting healthy approaches to alcohol and other drugs for all New Zealanders.

PART ONE. We support the classification of AMB-FUBINACA and 5F-ADB as Class A drugs - but with strong reservations

1. This Amendment Bill proposes to classify two particularly harmful synthetic cannabinoids as Class A drugs under the Misuse of Drugs Act 1975. Currently the two drugs sit by default under the Psychoactive Substances Act 2013.
2. In this part of our submission we argue that it does not make sense for harmful and dangerous substances to sit under the Psychoactive Substances Act (PSA). Using the logic of our current system, with low harm drugs falling under the PSA, and moderate to high harm drugs covered by the Misuse of Drugs Act (MoDA), it is "correct" to classify AMB-FUBINACA and 5F-ADB as Class A drugs.
3. Unfortunately, MoDA is an inadequate and harmful piece of legislation that needs a complete overhaul. We therefore support this classification as a temporary solution only.

The Psychoactive Substances Act was never intended to cover such harmful drugs as AMB-FUBINACA and 5F-ADB

4. The purpose of the Psychoactive Substances Act was originally to regulate for sale substances that carried a low risk of harm. It was passed at a time when many psychoactive substances were being sold at retail by legitimate outlets such as dairies, without regulation or control. The Act was intended to provide the control needed to protect people and minimise harms from these new substances.
5. Political fears at the time led to the Act being drafted in such a way as to be unworkable. As a result, no products were ever approved for legal sale. This fact, combined with an explosion of new synthetic drugs worldwide, has led to an increasingly dangerous black market in synthetic substances.
6. Tragically, somewhere between sixty and sixty-five deaths have been connected with synthetic substances since mid-2017, alongside hundreds of hospitalisations[1]. AMB-FUBINACA and 5F-ADB are extremely dangerous drugs, especially in the hands of a black market which (naturally enough) does not standardise dose or potency.
7. The substances do not sit naturally under the Psychoactive Substances Act, which was set up to regulate low harm substances.

[1] As reported by a spokesperson for Coronial Services in the NZ Herald on 1 March 2019: https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12208448

MoDA is the logical place to manage harmful drugs under our current, inadequate, drug framework

8. When the Psychoactive Substances Act was passed, it was always intended that dangerous drugs would continue to be classified and dealt with under MoDA. As such, we must reluctantly agree that it is logical to classify these two very dangerous substances under MoDA. There is simply nowhere else to put them.
9. We would nevertheless oppose this classification - despite it being 'logical' - if the newly strengthened police discretion had not also been included in this Amendment Bill. Our reasons are set out below.

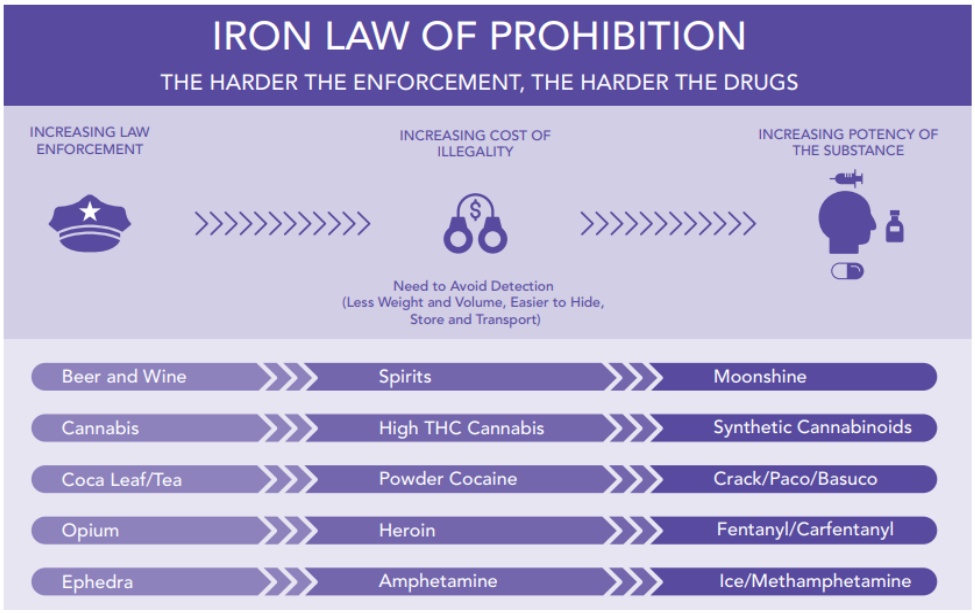
We are concerned that the vulnerable people who use synthetics will be further harmed by this classification

10. Over a period of several months in 2018 we undertook research into the synthetics crisis for the Ministry of Health. This included working intensively with services dealing with people using synthetics, including St John's, Police, hospital staff and homelessness charities. We also gathered several dozen survey forms from people who use synthetics to investigate how and why they use these dangerous substances.
11. It was clear from our investigations that people who use synthetic substances heavily are some of New Zealand's most vulnerable people. Most demonstrated a need for intensive support in many areas of their lives. Many were homeless and most were unemployed. They struggled to regulate their use of these substances and continued to use them despite knowing that they risked serious injury or death from doing so.
12. Classifying these substances as Class A puts these vulnerable people at risk of criminal conviction - whereas what they most urgently need is intensive health and social support.
13. In addition, the classification may increase the stigma surrounding use of the drug, turning people away from seeking help. It may also negatively impact the services that are available to assist them by influencing service providers (consciously or unconsciously) to discriminate against them.
14. Our concern covers not only those who use, but also those who deal synthetic substances – because in many cases they are the same people. Using synthetic substances at the heaviest end of the spectrum can cost hundreds of dollars per day. For many users, the only way to fund their use is to sell to others.
15. These vulnerable people could now face extremely heavy sentences of up to life imprisonment for supply, or a $1000 fine and 6 months imprisonment for possession and use.
16. The proposed change to police discretion in this Amendment Bill goes some way to allaying our concerns about the classification of these two synthetic

cannabinoids as Class A drugs. However this can only ever be a temporary solution while we work on overhauling the Misuse of Drugs Act.

We cannot expect increased powers of enforcement to reduce harm for any person

17. We are very sympathetic to Police and Custom's desire to make use of the better enforcement powers available under MoDA compared to the PSA. They are right to request any extra tools available to try to stem the tide of harm caused by these drugs.
18. However Police and Customs are being asked to fix a problem that can only constructively be dealt with in the health and social sectors – that is, through those services that focus on the demand side rather than the supply side of these drugs.
19. International evidence is clear that focusing on reducing supply and increasing enforcement *does not reduce harm for people who use drugs*. In fact, high sentences can actually exacerbate harmful drug use by pushing up their price, making dangerous products more economically attractive to dealers.
20. It can also make the products themselves more dangerous. The higher the risk for suppliers, the more incentive there is to make products stronger, less bulky and thus harder to detect. For example, as the drug war intensified between 1990 and 2007 in the USA, the purity of heroin increased by 60%. The potency of cannabis increased by 161% and cocaine purity went up by 11%.
21. This is known as the "iron law of prohibition", as shown in the figure below[2].



[2] Global Commission on Drug Policy, *Regulation. The Responsible Control of Drugs* (2018 report).

22. Long sentences for manufacture and supply do not address demand and will not reduce the harms caused by synthetic cannabinoids. We cannot fall into the trap of thinking that high sentences are justified because they make communities safer. They do not.

What does this impasse tells us? We need to completely overhaul our current drug framework

23. While the Misuse of Drugs Act is the sensible place to put harmful drugs at present, what we really need is a complete overhaul of the way drugs are treated under New Zealand law. We'd like the select committee to recommend this as part of its report back to Parliament.

We need to move the focus away from the supply side towards the demand side

24. Setting high penalties for drug use and supply is not a long term effective solution to reducing the harm caused by drugs. A more humane and effective approach would be to:

    a) remove criminal penalties for drug use and replace these with a health referral model;
    b) properly fund health and social interventions that address demand; and
    c) regulate the supply of lower harm drugs as originally intended under the PSA, so people have a safer alternative to dangerous substances.

25. In its 2011 report on the Misuse of Drugs Act, the Law Commission recommended exactly this:

> *"Recommendation one: The Misuse of Drugs Act 1975 should be repealed and replaced by a new Act, which should be administered by the Ministry of Health"* [3]

> *"We have concluded that a mandatory cautioning scheme is the most appropriate response to personal possession and use offences that come to the attention of the police. The key objectives of the scheme would be to remove minor offences from the criminal justice system and provide greater opportunities for those in need of treatment to access it."*[4]

[3] NZ Law Commission, *Controlling and Regulating Drugs. A review of the Misuse of Drugs Act 1975*, April 2011, page 23

[4] Ibid, page 225

26. The recent Mental Health and Addictions inquiry came to similar conclusions:

> *"The criminalisation of illicit drugs poses a barrier to seeking help, and convictions for personal drug use have far-reaching consequences on people's lives. Criminal sanctions for the possession for personal use of controlled drugs should be replaced with civil responses, such as fines or treatment programmes."*[5]

27. These proposals are not radical. There are successful examples of a health-focused approach already running in New Zealand. For example, Te Ara Oranga is an interagency pilot initiative in Northland run jointly by Police, health organisations and the community. People struggling with methamphetamine use receive health screenings and treatment instead of a conviction. In the pilot's first year, 308 people were referred for treatment, many by the Police.

We also need to rethink our current drug classifications, which are inconsistent

28. Drugs governed by the Misuse of Drugs Act are sorted into three tiers (Class A, B and C) based on the potential they have to cause harm. Unfortunately, the existing classifications have not been systematically reviewed over time, despite advances in scientific knowledge about specific drugs and the harm that they cause.

29. This has led to anomalies. As just one example, LSD and magic mushrooms (psylocibin), both of which were assessed as having a lower harm profile even than cannabis in a recent UK review, are Class A drugs in New Zealand[6]. Cannabis is a Class C drug, carrying significantly lower penalties.

30. The Law Commission report of 2011 called for a thorough review of current classifications:

> *"the classification system should be kept under regular review to ensure it remains up-to-date with developing scientific knowledge and relevant changes in the drug landscape. Current classifications should also be reviewed…. It is generally accepted that some of the current classifications are anomalous, and do not reflect available scientific* evidence about drug harm"

31. Unfortunately, this has not happened. A review is urgently overdue.

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[5] *He Ara Oranga.* Report *of the Government inquiry into Mental Health and Addiction*. Summary of main points, chapter nine, November 2018

[6] Nutt et al. (2010) http://www.ias.org.uk/uploads/pdf/news%20stories/dnutt-lancet-011110.pdf

The way the Expert Advisory Committee on Drugs is composed also needs review

32. The Law Commission recommended changing the composition and expertise of the Expert Advisory Committee on Drugs (EACD) to ensure transparency and independence. They recommended removing some government representatives from the Committee and instead adding members with expertise in areas such as neuroscience, emergency medicine and psychiatry. So far these recommendations have been ignored.

33. We would like to see an upgrade of the EACD take place in line with the Law Commission recommendations. This should happen as part of the replacement of MoDA, but could also happen sooner. This is essential to ensure our drug law is informed by the evidence and is fair to all.

PART TWO – increased Police discretion is an important step forward. It must be followed by an overhaul of our drug law

34. The Amendment Bill will require that Police use their discretion when they find someone in possession of any drug for personal use. The Police will be instructed to prosecute only if it is in the public interest to do so.

35. In fact, the Police must already satisfy a public interest test before they choose to prosecute any person. However our reading of this Bill is that the effect of these proposals would be to move us from a *presumption of prosecution* to a *presumption of non-prosecution* for those in possession of any illicit drug.

36. We are fully in support of this development and applaud the progress the government is making towards taking a health-focused approach to reducing the harm caused by drugs.

37. In addition, when considering whether a prosecution is required in the public interest, the Police will be required to consider whether a health-centred or therapeutic approach would be more beneficial than prosecution. Again, we fully support this requirement. This is in line with best practise and international evidence-led approaches to dealing with drug harm.

38. We also support the decision to extend this presumption of non-prosecution to *all drugs*, not just synthetic cannabinoids. Restricting the focus to one type of drug over another may incentivise the use of more dangerous drugs over other less harmful ones.

39. This part of the new Bill will go some way towards reducing the harm that classifying ABM-FUBINACA and 5F-ADB in MoDA may cause to vulnerable users of synthetic substances.

The increased discretion may significantly reduce the number of low-level drug convictions in NZ, which would be extremely positive

40. A total of 4,988 people were charged with low level drug offences in New Zealand in 2017[7]. 3,833 of those received a conviction. These people were disproportionately young, male and Māori[8].

41. A conviction can have a life-long negative impact, in particular restricting people's ability to gain employment. We are strongly supportive of any measure that reduces the number of convictions given out for low level drug offences in this country.

[7] We define low level drug offences as drug possession, use, or possession or use of a drug utensil.

[8] Statistics received from the Ministry of Justice as part of an OIA, dated 25 June, 2018.

42. However we do note that it is far from clear what the impact of this part of the Bill will be on the overall number of prosecutions for low level drug offences. While the overall number of prosecutions should drop, especially in the short term, it is possible that the effect will be smaller than expected.
43. This is because the majority of low level drug prosecutions include other non-drug charges. For example, in 2017 only around one quarter of people convicted for low level drug offences had no other (non-drug) charges to answer as part of their case.
44. For the remaining three quarters of low level drug prosecutions it may be that Police will continue to prosecute for personal possession, despite the new presumption against doing so. This would be a shame.
45. Much will depend on how Police guidelines are developed in response to the Bill, and the effects should be monitored closely.

On the downside, this amendment won't help heavy users caught with more than 56g of smoke-able product

46. We note that the threshold over which a person will be assumed to be in possession for the purposes of supply is 56 grams. This may cause issues for those who use heavily.
47. Responses from our survey of users of synthetics indicate that heavy users may use 15 grams of product per day. One respondent knew of two clients using 45 grams per day, though this was unusual. This makes it possible that some heavy users may be wrongly prosecuted for supply, which carries very high penalties under the Act.
48. This once again highlights that it is time to overhaul our existing drug law. The Law Commission in its 2011 report proposed to remove the automatic 'presumption of supply' thresholds and replace them instead with a category of 'aggravated possession'.
49. Aggravated possession would carry higher penalties than simple possession, but these would not be as high as the penalties for dealing. If a person could show they were a heavy user and the drugs were for their own use, this would reduce the sentence. This strikes us as a much fairer system, and much better suited to helping users of synthetic cannabinoids.

This amendment will not help those who deal to support a drug dependency

50. As highlighted earlier, many people who are dependent on synthetic substances deal in order to support their own dependency.
51. The classification of synthetics as Class A substances could have hugely negative impacts on the life outcomes of these people by subjecting them to

harsh penalties, even though the more effective, cost-efficient and compassionate choice would be to offer them a health intervention.

52. Our current law is simply too blunt an instrument to take account of the motivations behind a person's offending. Again, the only way to remedy this is to see this Amendment Bill as a temporary fix for a broken system.

Discretion can be a double-edged sword, particularly for Māori

53. This amendment proposes to strengthen Police discretion not to prosecute for drug use and possession.

54. Historically, Māori have not benefitted from Police discretion. We are concerned that keeping discretionary power about whether to prosecute in the hands of Police may mean continued over-representation of Māori in conviction and imprisonment rates.

55. In its 2011 review of the Misuse of Drugs Act, the Law Commission referred to this type of police discretion as a 'double-edged sword'. While it can minimise costs and harms by diverting people away from the criminal justice system who ought not to be there, it can also provide an opportunity for unfairness, discrimination and uncertainty[9].

In the long run we need a system that does not rely on Police discretion. The Law Commission proposed a workable model

56. The Law Commission proposed a system of mandatory cautions for dealing with drug use. This system would dispense entirely with the need for Police discretion. Instead, no one would be prosecuted for drug use or possession, except in certain carefully prescribed situations.

57. The Law Commission felt that objective criteria was essential to ensure a fair system:

> *"We…have some reservations about an approach where the enforcement policy to personal possession and use offences is essentially regarded as an operational decision about the exercise of police discretion that is made behind closed doors"*[10]

58. In the long run, we need a system that will avoid the use of discretion altogether and instead provide health interventions for all those who need them. At the risk of sounding like a broken record, this means completely reworking our drug law.

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[9] NZ Law Commission, *Controlling and Regulating Drugs. A review of the Misuse of Drugs Act 1975*, April 2011, page 215

[10] ibid, page 216

PART THREE – The new temporary drug class order gives too much power to the Minister, without sufficient checks and balances

59. The Amendment Bill creates a temporary drug class order. The Minister will be able to designate substances to be treated as Class C1 controlled drugs under the Act.

60. The change is intended to provide a means by which new substances entering the market can be very quickly classified into MoDA, rather than languishing under the PSA.

61. This is not the first time we've had temporary drug class orders available under MoDA. They were used to control emerging psychoactive substances from 2011 until the introduction of the Psychoactive Substances Act in 2013. The Amendment Bill proposes that this temporary drug class order be put back into MoDA.

We recognise the desirability of classifying drugs quickly in a rapidly changing drugs environment

62. New psychoactive drugs are emerging increasingly quickly. In 2012 the UN identified 269 new psychoactive substances - this number had grown 479 by 2016[11].

63. Drug manufacturers have proven over the years that they can tweak their recipes faster than new substances can be classified under the Misuse of Drugs Act. The thinking behind the temporary class drug order is that it will help us keep ahead of the explosion of new drugs on the market.

However the temporary drug class order gives significant power to the Minister with no checks and balances

64. Historically, new drugs have been classified into MoDA either through an Act of Parliament or an Order in Council (other than from 2011-2013 when the temporary drug class provided a third route).

65. Classifying a drug through an Act of Parliament obviously includes a number of checks and balances on the power of the Minister - as is the case with this Amendment Bill going through the select committee process, for example.

66. The rules around bringing drugs into MoDA via an Order in Council have been amended many times over the years, but in general they have included two important checks and balances on the Minister.

[11] https://www.unodc.org/wdr2018/prelaunch/WDR18_Booklet_1_EXSUM.pdf

67. Firstly, the Order in Council is subject to the scrutiny of Parliament. Second, the Minister has to consult about the proposed classification with the Expert Advisory Committee on Drugs and consider any advice given by them. The EACD is required to give advice on a wide range of matters relating to that drug, including the effects (good and bad), the likelihood of drug abuse and any potential risks to public health.

68. The Law Commission, in 2011, highlighted their serious concerns with the process of classifying drugs by Order in Council rather than by an Act of Parliament. They were concerned at the lack of public participation in this method of classification. And they also felt that decisions of this kind, which bear on individual liberty, should be subject to the full parliamentary process.

69. They recommended in their report that an Act of Parliament be the only way to classify new drugs. If the Law Commission was concerned with classification via Order in Council, we can only presume they would be very concerned indeed with the idea of a temporary drug class order.

70. The proposal for a temporary drug class order in the Bill sidesteps even the limited checks and balances provided by the Order in Council.

71. We can imagine a scenario in which an energetic Minister might suddenly declare a l ow harm substance to now come under MoDA using the temporary drug class order. The result would be that without any public or parliamentary scrutiny, New Zealanders would, overnight, become subject to fines or even imprisonment for selling or using that substance. This is concerning from a human rights perspective.

The need to classify drugs quickly is not as pressing as the need to protect human rights by including checks and balances in the process

72. Before the Psychoactive Substances Act was developed, new and dangerous drugs hitting the market were legal until scheduled under MoDA. That is no longer the case - the PSA reverses the system so that new psychoactive substances are illegal unless and until approved.

73. This fact removes most of the urgency around drug classification that existed when temporary drug class orders was first inserted in MoDA in 2011.

74. We submit that since the introduction of the PSA, the Minister no longer needs the power to bring new substances into MoDA under urgency. The PSA can function as a ‘holding pen’ for new substances until they can be classified under MoDA. Much more important is that any new classification is subject to the scrutiny of Parliament and the EACD.

75. We further submit that if a temporary drug class order is introduced, some further checks and balances should be added into the process.

FINAL RECOMMENDATIONS

Classification

1. We support the classification of ABM-FUBINACA and 5F-ADB as Class A drugs, but only as a temporary fix while we await a full review of MoDA.
2. We note the harm that may be caused by this classification to very vulnerable people, especially those who use heavily, or who deal to support a drug dependency.
3. We note that this classification is very unlikely to reduce the harm caused by synthetics.
4. We recommend a complete overhaul of MoDA and its replacement with a health-focused drug law which will address demand for drugs. This overhaul should, amongst other things:
    a) replace criminal convictions with a health referral model;
    b) rethink our drug classification system, which classifies drugs inconsistently; and
    c) review the composition of the Expert Advisory Committee on Drugs.

Police discretion

5. We support and applaud the new presumption of non-prosecution for possession and use offences provided for in this Bill. We especially support:
    a) the focus on health and therapeutic approaches; and
    b) that this amendment applies to all drugs, not just synthetic cannabinoids.
6. We note this amendment may not reduce the number of convictions as much as anticipated by some, and we recommend this is monitored closely.
7. We note with concern that this amendment does not help heavy users of synthetics who may be penalised by the classification of the two synthetic substances as Class A drugs. We also note that the amendment will not help those who deal synthetics to fund a drug dependency.
8. We note the dangers, especially to Māori, of relying on police discretion to determine who to prosecute.
9. We recommend an overhaul of our current law to remove all reliance on police discretion in our responses to drug use and possession.

Temporary drug class orders

10. We advise against the inclusion of these new orders. They do not provide sufficient checks and balances on the power of the Minister to create a new offence without public and parliamentary scrutiny.
11. Alternatively, we recommend that additional checks and balances be added to the way this new power can be exercised.